Supreme Court, U.S.
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No. 02-1201

IN THE

Supreme Court of the United States

DIANA DUNCAN,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the peculiar facts of this claim of sexual harassment to determine whether the Court of Appeals correctly held that petitioner failed to make a submissible jury case.

RULE 29.6 STATEMENT

Respondent is General Motors Corporation. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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Respondent General Motors Corporation ("GMC") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case, reported at 300 F.3d 928 (8th Cir. 2002).

STATEMENT OF FACTS
Background

Petitioner was hired by the St. Louis Community College District ("District") in August 1994 to work as a Technical Training Clerk at its Center for Business, Industry, and Labor ("CBIL") program at GMC's Wentzville, Missouri, plant (Tr. 205-06, 333-35). Under the CBIL program, the District assisted GMC in training its employees (Tr. 582, 587-88). Petitioner was advised from the outset of her employment by her supervisor, Jerry Reese, Manager of Operations, Manufacturing, and Training for the District, that she was employed by the District (Tr. 205-06, 538). Petitioner recognized Reese's — and by extension, the District's — supervisory authority over her employment. She submitted to Reese her weekly time sheets and bi-weekly Activity Summary Reports on District forms (Tr. 338-41).

Petitioner's job description required her in part to perform clerical duties for GMC employees (Tr. 342-45). Although the petition and the dissenting opinion below refer to Jim Booth, the alleged harasser, as petitioner's supervisor, in fact he was an hourly union employee who was the union's Training Coordinator in the High Tech area (Tr. 206, 276-77, 686-88).[1]

[1] The trial court rejected petitioner's proposed jury instruction submitting her claim on the theory of supervisor harassment, and instructed instead on the theory of co-employee harassment (Tr. 1013-15, 1100-01). Petitioner did not cross-appeal from the court's

Continued on Next Page

Petitioner testified that very shortly after she began working in the High Tech area in 1994, Booth called her and asked her to meet him off-site at a restaurant (Tr. 213-15). At that meeting, according to petitioner, Booth told her that he was unhappy in his marriage and that he was in love with a co-worker. He then asked petitioner, "Would you be willing to have a relationship with me?" (Tr. 215-16). Petitioner responded in the negative, and Booth later apologized and asked petitioner if they "could start over" (Tr. 216, 218). Petitioner did not allege that Booth ever again approached her for a date, let alone a relationship. Petitioner told Joe Rolen, a paint supervisor at the Wentzville plant, that Booth had asked her if she wanted to have a relationship shortly after that incident occurred, but did not complain about it (Tr. 216-217, 355-56).

After this off-site meeting, petitioner testified, she perceived a difference in Booth's treatment of her (Tr. 218). She offered a laundry list of actions by Booth that she claimed evidenced this change in behavior, but was vague about the dates on which these events occurred. She testified that he began to criticize her working hours and her job performance, stating that "he could hire a Kelly person and get better service" (Tr. 219, 235-36). Petitioner conceded that Booth directed similar threats to all District employees of both sexes:

> "Whenever *we* did something Jim didn't like, he constantly made reference to he got — he was training out [sic] or he got Lewis and Clark College out or he got this person fired or that person. And

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Footnote 1 Continued

refusal to submit her case on a supervisor-harassment theory. Hence, the references to Booth as a "supervisor" in the petition and the dissenting opinion are simply wrong.

> he would make numerous threats towards *us*. If *we* did something wrong — myself, mainly — he would make sure that *we* no longer worked there" (Tr. 298, emphasis added; see also Tr. 299).

Other District employees testified that Booth threatened their jobs and the jobs of all the District employees (Tr. 526, 703-04, 723).

Booth's computer had a screen saver with the image of a naked woman (Tr. 233). Petitioner had to work on Booth's computer for certain tasks because the computer the District provided her did not have the necessary software program loaded on it and was not on GMC's system (Tr. 528-30, 761-62).

Booth directed petitioner to eat lunch where she could hear the telephones (Tr. 219). Petitioner admitted that Booth gave directions to other District employees as well, male and female (Tr. 224-25, 226-27). On four or five occasions Booth touched petitioner's hand when she handed him the phone (Tr. 233-34). She wasn't sure whether she told Booth or a co-worker that she did not want him to do that, and was able to avoid it simply by changing the manner in which she handed the phone to him (Tr. 233-34).

Throughout petitioner's tenure with the District, Booth kept in his office an eight-inch high ceramic figure in the shape of a man holding a planter containing a cactus (Tr. 222-23, 530). The cactus appeared as if it protruded from the man's pants (Tr. 530). The planter, which petitioner viewed on a daily basis for more than two years before she complained about it, was in full sight of all employees, including males (Tr. 267, 554). Sometime between June 1995 and June 1996, petitioner told Booth she wanted to be promoted to an illustrator position (Tr. 230, 330-31). She testified

that Booth told her she would have to "prove her artistic ability" by drawing the planter, with the cactus in it (Tr. 230-31). Petitioner later learned that she lacked the required degree to become an illustrator, and that in any event Booth had no authority to hire illustrators (Tr. 233, 382, 384).

Petitioner introduced into evidence, over GMC's objections, several cartoons drawn by a District employee which were displayed in her work area on unspecified dates, "possibly" in 1995 (Tr. 239-47, 249-58, 331-32). One was a poster of the "Man Hater's Club of America," listing petitioner as President and CEO (Tr. 253-54). Although the poster was drawn by a District employee, petitioner testified vaguely that Booth "participated" in its creation (Tr. 240, 253-54, 256, 258), but did not connect him to the display of the poster.

Petitioner testified that on two separate occasions Booth displayed to her, and to other people in the office, a pacifier shaped like a penis (Tr. 297, 407-08). Petitioner's response was, "You're ignorant. Show Lisa [Kearney]" (Tr. 407-08). She never told any GMC supervisor about the pacifier, and was unable to say when it was shown to her, and likewise did not establish that she had complained about the hand-touching (Tr. 297, 407-09, 465, 612-18, 885-95, 922-29, 971-73).

In April 1996, Booth and Gene Spurgeon, a District employee, arranged to have petitioner "arrested" as part of a charity event. Petitioner testified that she "got scared" when the "police officer" approached her, but she agreed to be escorted out of the plant by the officer after it was explained to her that it was for charity (Tr. 269-70). When Booth bailed her out, over her objection he drove her to a bar (Tr. 271-72). Petitioner did not claim that Booth engaged in any inappropriate behavior at the bar.

Petitioner's Complaints to GMC Management

Petitioner testified that she complained to Reese of the District regarding Booth's treatment of her and met with an attorney in 1994 or 1995 and in 1996 or January 1997 (Tr. 312-14). Several GMC hourly employees told her in early 1995 that she should talk to Betty Kling in GMC's Human Resources department regarding Booth's treatment, but she never did so (Tr. 401, 492). Although she claims to have told both Rolen and Training Coordinator Ed Ish that it was difficult to work with Booth, she never offered any specifics (Tr. 425, 489). Petitioner acknowledged that she was not sure how much Ish knew about Booth's conduct (Tr. 367-68, 411, 972).

It was not until April 1, 1997, that petitioner voiced any objection or complaint to any member of GMC's management regarding alleged sexual harassment on the part of Booth (Tr. 407, 411-22, 424-25, 463-65, 469, 511-12). Sometime before April 1, petitioner related to Bob Boatwright, a union official, "everything that [she] had been through, beginning with 1994" (Tr. 308, 373). Within a week, she again recounted her "story" to Boatwright and Wayne Belue, chairperson of the UAW local at the Wentzville plant (Tr. 308, 421). Petitioner agreed, at Belue's suggestion, to meet with Tom Pilkington, GMC's personnel director at Wentzville (Tr. 308-09).

Petitioner told Pilkington that she had not previously complained to any member of GMC's management (Tr. 617). Although she had taken pictures of Booth's planter, and had kept copies of the Man-Hater's Club poster and other items, she did not show any of those pictures or exhibits to Pilkington (Tr. 676-77). Nor did she bring to the meeting her notes of the events complained of, including dates of specific incidents (Tr. 431-32).

At their meeting, Pilkington assured petitioner that she would not lose her job over her complaints, and that GMC took sexual harassment very seriously (Tr. 426-27, 430, 633). He advised her that she would need to meet with Al Moellenhoff, GMC's EEO Coordinator (Tr. 617-18). Pilkington went to Booth's office later that same day and removed the planter and locked it in a desk drawer (Tr. 623-26). He also called Moellenhoff, gave him basic information regarding petitioner's complaints, and asked him to call petitioner and to conduct an investigation (Tr. 634-35, 883).

Pilkington contacted Rebecca Admire, Director of the CBIL program for the District, and told her that petitioner felt that she had been harassed, and that the District should respond (Tr. 656-57). He left a message for petitioner on April 18, and then called Admire to tell her that petitioner still had not given him the requested statement (Tr. 681-82).

At a meeting on April 11, 1997, petitioner agreed to provide Moellenhoff with copies of the documents she mentioned, as well as a written statement memorializing her allegations (Tr. 370-71, 373, 435, 885-86). Moellenhoff told her he was counting on her written statement to enable him to conduct his investigation (Tr. 886).

Petitioner testified that on May 5, 1997, Booth asked her to type up the beliefs of what she called the "He-Men Women-Haters' Club," which he had drafted (Tr. 303-07). She refused. Two days later, without ever having submitted the requested written statement of her allegations, petitioner tendered her resignation to Jerry Reese, Steve Long, and Rebecca Admire of the District (Tr. 466). She indicated on her EEOC questionnaire that she resigned on the advice of counsel.

Thus, of the specific acts of which petitioner complained, only five — the inquiry about a relationship, the hand-touching, the poster, the "He-Men" beliefs, and the direction to draw the planter — were directed to petitioner alone (and not to male employees as well) and had any arguable basis in sex or gender. And those five incidents were sprinkled over more than two and one-half years.

Prior to petitioner's resignation, Long had offered to relocate her to another District work site, but she refused because it would inconvenience her (Tr. 443-44). The day she quit, she became aware that GMC managers had discussed moving her to a different location within the Wentzville plant, but she had already made up her mind that she was going to resign her position with the District (Tr. 444-47). At the time of her resignation, petitioner had a job offer from an investment broker and had been talking to a lawyer (Tr. 313-14, 467-68).

Shortly after petitioner resigned, Moellenhoff and Steve Eastvold, GMC's Supervisor of Labor Relations for the Wentzville plant, counseled Booth regarding the planter, put him on notice of possible future disciplinary action if they received further information, and told him the investigation was ongoing (Tr. 908-10). They reminded Booth of GMC's sexual harassment policy and told him to stop any prohibited actions immediately (Tr. 909-10). Shortly afterwards, Moellenhoff held a special sexual harassment course for all union officials and GMC employees connected with training operations, including Booth (Tr. 911). GMC received no complaints of sexual harassment against Booth after he was put on notice on May 20, 1997 (Tr. 912).

Proceedings Below

After settling her claim with the District, petitioner proceeded to trial against GMC. On December 3, 1999, a jury in the Eastern District of Missouri returned a verdict in favor of petitioner on both counts of her complaint, alleging sexual harassment and constructive discharge. She was awarded $700,000 in damages for emotional distress on her sexual harassment claim, and $300,000 for emotional distress on the constructive discharge count.

After the district court denied GMC's post-trial motions, GMC appealed to the Eighth Circuit. On August 22, 2002, the Court of Appeals reversed and ordered dismissal of the complaint holding (a) that petitioner had failed to make a jury submissible case that the alleged harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and (b) that she was not constructively discharged as a matter of law. Chief Judge David Hansen wrote the majority opinion for himself and Judge Roger Wollman; Senior Judge Richard Arnold filed a dissenting opinion. Rehearing en banc was denied with four active judges voting in favor, four opposed, and three abstaining (Pet. Apdx 33a).

Petitioner has filed a petition in this Court addressing her sexual harassment claim only.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NOTHING MORE THAN THE APPLICATION OF AN ADMITTED STANDARD OF REVIEW TO A UNIQUE SET OF FACTS.

Petitioner asks this Court to spend its scarce resources deciding whether the peculiar evidence of sexual

harassment adduced in this case falls just beyond or just short of the threshold required for jury consideration. The standard of review proposed by the petition (p. 9) does not differ from that employed by the majority opinion below — or, for that matter, from that used by the dissent. The majority acknowledged that judgment as a matter of law is proper only "when the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict" (Pet. Apdx 7a). The Court properly proceeded to examine the totality of the evidence, construing it in the light most favorable to petitioner (*id.* at 8a-9a). The dissent did not take issue with the standard applied by the majority, but only with its application in the context of this case.

The dispute, therefore, is not about the standard of review but, rather, how that standard applies to the evidence of sophomoric behavior depicted in the record below. It is hard to imagine how this Court's application of that established standard to these facts would provide meaningful guidance in other cases of alleged harassment featuring completely different boorish antics or obnoxious comportment.

The underlying theme of the petition seems to be that jury verdicts in discrimination cases are sacrosanct and must be insulated from appellate scrutiny. Such a notion not only conflicts with the duties imposed on federal judges by Rules 50 and 56 of the Federal Rules of Civil Procedure, but also ignores decisions of this Court such as *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329 (1967), and *Weisgram v. Marley Co.*, 528 U.S. 440, 443, 454 (2000), which reaffirmed the right and duty of the appellate courts to examine the evidentiary record and exercise their "informed discretion" to "decide whether, as a matter of law, judgment should be entered in favor of a verdict loser." Petitioner's crabbed

view of the role of judicial oversight not only runs afoul of *Neely* and *Weisgram* but also of summary judgment decisions such as *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), recognizing the right of the judiciary to dispose of factually unsupported claims as a matter of law.

It is black letter law that:

> "In determining whether a motion for judgment as a matter of law should have been granted, the appellate court applies the same standard as does the trial court in passing on the motion originally. . . . Whether judgment as a matter of law should be granted is a question of law and on questions of that character litigants are entitled to full review by the appellate court without special deference to the views of the trial court." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2536 (2d ed. 1995).

The review of the record by the Court of Appeals which led to its conclusion that petitioner did not make a submissible harassment case is just the sort of legal determination necessarily made by trial and appellate courts every day, whether pursuant to Rule 50 or 56.

Petitioner cites Justice Scalia's concurring opinion in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Pet. 8-9), but those comments do not support her argument that the Eighth Circuit's opinion represents a departure from this Court's precedent. In his concurrence in *Harris*, Justice Scalia lamented the lack of certitude afforded by the standard for actionable sexual harassment set forth in the majority opinion, and expressed his concern that "today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egre

gious enough to warrant an award of damages." 510 U.S. at 24. Justice Scalia's concurrence certainly does not constitute an endorsement of the proposition – underlying petitioner's thesis – that jury verdicts in harassment cases should be insulated from appellate review.

Since *Harris*, this Court has emphasized that Title VII is not intended to be "a general civility code," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'"; and that "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). "Properly applied, [the Court's standards for judging hostility] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Id.* at 788. Thus, Justice Scalia's concern regarding inadequate guidance provided to juries has been ameliorated by this Court's subsequent decisions. And although petitioner maintains that the Court of Appeals' opinion "conflicts with . . . the Court's guidance in *Harris*" (Pet. 11), it is the affirmance of the jury's verdict sought by petitioner – based on conduct that was inappropriate but not extreme, severe, or pervasive – that would conflict with this Court's body of authority regarding the proper standards for judging workplace hostility.

Contrary to petitioner's assertion that "[t]here can be no doubt that the Eighth Circuit improperly weighed the evidence and the credibility of the witnesses" (Pet. 10 n.5), she points to no specific credibility determina

tions, recalibration of evidence, or inference-drawing by the Court of Appeals. Petitioner confuses the Court of Appeals' determination that her evidence was legally insufficient to sustain the verdict with "improperly weigh[ing] the evidence and the credibility of the witnesses" (Pet. 10 n.5). The Eighth Circuit did not make its own factual findings, but accepted as true all of petitioner's evidence regarding the alleged harassment, concluding as a matter of law that petitioner came up short.

Petitioner's recitation of cases from other circuits, in an effort to compare their views concerning the legality of a broad range of conduct, is not a productive exercise (Pet. 13-15). The facts described in the parentheticals for cases imposing liability are taken out of context, and represent in most instances less than all of the evidence presented by the plaintiff. Even so, the wide variety of immature and crude behavior in the cited cases demonstrates the futility of attempting to craft a "one size fits all" standard for limitless permutations of sex-related comments, actions, gadgets, names, etc. Because of the nature of the subject matter, the decision below has limited precedential value. What guidance, for example, would the Eighth Circuit's treatment of a ceramic planter-with-cactus afford for another court confronted with conduct of the kind found in the cases discussed by petitioner? Each case is intensely fact-specific.

Similarly unhelpful is petitioner's reference to a statistical analysis regarding "appellate court behavior" in civil rights cases (Pet. 17-18). Review of such statistics in a vacuum, without any information regarding the facts and circumstances at issue in each case, adds nothing to petitioner's claim that the Eighth Circuit erred in reversing the judgment *in this case*, or

that the federal appellate courts as a whole are applying improper or inconsistent standards in reviewing employment cases. Notwithstanding petitioner's concern about "correct[ing] . . . unfavorable perception[s]" (Pet. 18), each case must be assessed with regard to the particular facts and circumstances at issue to determine whether a submissible case of sexual harassment has been met under the guidelines set forth by this Court.

Petitioner opines that "[p]erhaps juries nationwide are no more consistent in their case-to-case determinations than the several courts of appeals," but states that "juries in these cases are not creating an inconsistent and confused body of judicial precedent" (Pet. 15). On the contrary, allowing jury verdicts to stand despite insufficient supporting evidence – particularly when they are of the magnitude involved here – unfairly penalizes the employers involved in those cases, and encourages disgruntled employees to roll the litigation dice. Appellate scrutiny is necessary to provide as much balance and legal oversight as possible, given the often-thin line between rudeness and harassment, between personality conflicts and antagonism rooted in chauvinism, and between performance-based discipline and gender-based discipline.

Because the Eighth Circuit's review of the evidence supporting the verdict here was necessarily specific to the particular facts before it, it is singularly inappropriate for this Court's review, as the dedication of further judicial resources would yield little, if any, guidance for future cases brought on entirely different facts.

II. REVERSAL OF THE JURY VERDICT WAS ALSO APPROPRIATE ON GROUNDS NOT REACHED BY THE COURT OF APPEALS.

Although the Eighth Circuit's determination that petitioner "did not show a sexually harassing hostile work environment sufficiently severe or pervasive so as to alter the conditions of her employment" was dispositive of GMC's appeal, GMC raised several other potentially determinative issues that the panel did not reach. As reflected in our Statement of Facts, the Eighth Circuit's judgment is supportable not only on the basis discussed by that court, but also because GMC neither knew nor should have known of Booth's conduct and took prompt actions to stop any harassment once petitioner finally complained. Because of its ruling on the "severe and pervasive" prong, the Court of Appeals did not reach these other two aspects of a submissible case, either of which would likewise require judgment for respondent. *See Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999); *Zirpel v. Toshiba America Info. Sys.*, 111 F.3d 80, 81 (8th Cir. 1997). Given these sufficient bases for the Eighth Circuit's judgment, it makes little sense to consider the issue raised by the petition in the context of this case, which can be resolved in GMC's favor on several alternative grounds to be briefed by GMC if certiorari is granted.

And there is yet another impediment to review of petitioner's Question Presented. Petitioner's claim was also defective because she was not an employee of respondent. Rather, as the Statement of Facts indicates, she was employed by the District and was assigned to work in the District's CBIL at respondent's plant in Wentzville, Mo. (Tr. 205-06, 333-35). She applied to and was hired by the District, and virtually all details of her employment were controlled by the

District (Tr. 204-07, 334-35). Her job description was supplied by the District, which paid her and provided other benefits (Tr. 242-43, 335, 685-86). Her time sheets were submitted to the District, and she addressed her resignation to the District manager (Tr. 339-41, 349).

Respondent contended at trial and on appeal that petitioner had no claim against it because she was not an employee of GMC and therefore was not entitled to sue it under Title VII, which covers persons who are "employees." *See, e.g., Wilde v. County of Kandiyohi*, 15 F.3d 103, 104 (8th Cir. 1994) (Title VII protects workers who are employees, not independent contractors); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1242-43 (11th Cir. 1998) (courts have almost universally held that the scope of the term "any individual" is limited to employees; only those plaintiffs who are employees may bring a Title VII law suit), *cert. denied*, 528 U.S. 930 (1999); *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees"), *cert. denied*, 522 U.S. 1047 (1998); *Mangram v. General Motors Corp.*, 108 F.3d 61, 62 (4th Cir. 1997) (ADEA, which contains same "any individual" language as Title VII, covers only employees).

The district court ruled that petitioner's cause could proceed notwithstanding her status. The Court of Appeals declined to decide the issue because of its ruling that petitioner was not a victim of sex discrimination (Pet. Apdx 11). If certiorari is granted, however, respondent also reserves the right to seek affirmance of the judgment below on the alternative ground that petitioner is not a person entitled to invoke Title VII *vis-à-vis* GMC.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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